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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 32

JAMES R. HOFFA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CRIMINAL COURTS BAR ASSOCIATION
(OF LOS ANGELES COUNTY),

Amicus Curiae.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CRIMINAL COURTS BAR ASSOCIATION (OF LOS ANGELES COUNTY)

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(of Los Angeles County)

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BRIEF AMICUS CURIAE OF THE CRIMINAL COURTS BAR ASSOCIATION (OF LOS ANGELES COUNTY)

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

The Criminal Courts Bar Association of Los Angeles County herewith presents its brief amicus curiae in the case of James R. Hoffa v. United States of America, No. 32, October Term, 1966.

The Solicitor General of the United States and the defendants have each consented to the filing of this brief amicus curiae on the merits of the case. (See Appendices A, B, C and D)

The petition for certiorari amicus curiae by the Criminal Courts Bar Association was filed on January 14, 1966 and this Court granted the petition amicus curiae and the right to file a petition on the merits on January 31, 1966.

The order specified as follows:

> "The motion of the Criminal Courts Bar Association of Los Angeles for leave to file a brief, as *amicus curiae* in No. 794 is granted. The petitions for writs of certiorari are also granted limited to the following question:
>
> "'Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.'"

The case has now been renumbered No. 32, October Term, 1966.

Jurisdiction is granted by Rule 42, Rules Supreme Court of the United States.

BRIEF AMICUS CURIAE ON BEHALF OF JAMES R. HOFFA

INTEREST OF THE CRIMINAL COURTS BAR

Petitioners, the Criminal Courts Bar Association of Los Angeles County, composed of lawyers active and specializing generally in the practice of criminal law, enter this important case amicus curiae on behalf of James R. Hoffa in order to present their views to protect and preserve the fundamental rights of lawyers and clients everywhere from wrongful intrusion and their right of privacy, and particularly to protect their constitutional rights as governed by the Fourth, Fifth and Sixth (and Fourteenth) Amendments to the Constitution of the United States.

The interest of the Criminal Courts Bar Association emanates from its fundamental right and duty to advance and uphold high principles by lawyers — both prosecution and defense — practicing criminal law in the United States and in preserving the right of absolute privacy of counsel and client as a guarantee inherent in the protection of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. For, if the government could intrude with impunity, so would the defense lawyers into the offices of the prosecution and their investigating agents. The very thought is shocking!

The ultimate decision which this Court will render in this case will tell whether *effective* assistance of counsel in defense of those accused of crime includes guarantees from unlawful intrusion by opposing prosecuting counsel or their secret agents and whether this *effective* assistance is protected by the Sixth Amendment to the Constitution of the United States; also by the Fifth Amendment to the Constitution of the United States entitling a

defendant to the protection against self-incrimination and to procedure that results in a fair trial, as guaranteed by the due process clause of the Fifth Amendment, and by the Fourth Amendment, forbidding illegal searches and seizures.

This Association, numbering more than 350 members, is composed of members practicing law in the State of California, who are also members of the State Bar and the Federal Bar in the federal district courts in the Ninth Circuit Court of Appeals. Many are members of the Bar of the Supreme Court of the United States. These members are also active in connection with other bar associations that are interested in preserving, upgrading and maintaining high standards of criminal justice in America. Basic justice, guaranteed by our federal Constitution, requires that these rights be safeguarded and preserved.

Members of the Criminal Courts Bar, including the writer of this brief, are members of the Criminal Law Section of the American Bar Association, of the National Association of Defense Lawyers in Criminal Cases, of other Bar groups and of the Lawyers Club of Los Angeles, as well as its own association. We believe that the purity of justice must eventually be preserved by the courts where justice is exemplified. (*Olmstead v. United States*, 277 U.S. 438) The courts are the great teachers. Anything that pollutes justice at the beginning, contaminates the whole stream. It is only the courts rejecting evidence secured by any unconstitutional methods (*Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081) that can prevent injustice.

It is with this in view that the Criminal Courts Bar Association of Los Angeles County objects to the pro-

cedural use in this case, not of a microphone or an electronic device or bug, but actually of a human "plant" in the offices, among the defense — the conference tables, and associations of a defendant and his attorneys.

The use of that human "plant" in this case — Edwin G. Partin — to intrude upon the privacy of the defendant and his counsel, violated the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, whenever it occurred. The use in the later trial of Hoffa, to convict him of Counts 3 and 5, now before the Court, by supposedly using his own words, thus deliberately and secretly heard by the government agent and spy, and offered in evidence in this trial, violates the Fifth Amendment to the Constitution of the United States.

Massiah v. United States, 377 U.S. 201, 12 L.ed.2d 246;

Griffin v. California, 380 U.S. 609, 14 L.ed.2d 106.

A secret microphone, such as was planted in the closet of the bedroom of Irvine and his wife, in *Irvine v. California,* 347 U.S. 128, 98 L.ed. 561, to get evidence and leads to future bookmaking, could only record what the apparatus reported. A human could pattern his testimony to suit.

If the defense had planted a secretary in the offices of the United States Attorney General and of his administrative assistant, Walter Sheridan, there would have been a hue and cry and a prosecution if the spy had been produced to testify and to vitiate the criminal prosecution, to show prejudice and bias or to impeach the government's case in any respect. This is apparently what was attempted at a lower echelon in *Caldwell v. United States,* 205 F.2d 879. Such intrusion into places supposedly open to only the most loyal, would be frowned upon and prose-

cuted, and would result in exclusion of any matters gained thus surreptitiously and by trickery.

Caldwell v. United States, 205 F.2d 879;

Lisenba v. California, 314 U.S. 219, 86 L.ed. 166.*

The government seems to have taken the position in the courts below that because the alleged information was gained during the intrusion of a government agent prior to and during the first trial, the Test-Fleet case, it was all right to use it in a subsequent trial and that time somehow erased its illegality or the impropriety and unconstitutionality of the method of securing it. A thief never gets title. He is never entitled to the product of his theft, whether the objects are tangible, such as stolen automobile tools or other objects, or intangible material, such as trade secrets, patented ideas, formulas or copyrighted material. And, one should add, things learned from a defendant or his lawyers by secretly intruding into their confidences.

In *Massiah v. United States,* 377 U.S. 201, 12 L.ed.2d 246, this Court said that the government is not entitled to statements secretly obtained by a co-defendant.

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* "If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the State, the trial of an accused person results in his conviction he has been denied due process of law. The case can stand no better if by the same devices a confession is procured and used in the trial. . . . Where the claim is that the prisoner's statement has been procured by such means we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding a court, or verdict of a jury or both." *Lisenba v. California,* 314 U.S. 219, 86 L.ed. 166.

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.ed. 319, Mr. Justice Holmes pointedly stated that agents of the government could not steal documents, photograph them, return them and later use the information thus gained.

The stolen information thus secured by government agents in the Hoffa case was illegally gotten, in the first instance, and continues to be illegal, in the second instance. Time or purpose could not validate what was unconstitutionally obtained. The motions to suppress and exclude Partin's testimony should have been granted.

SPECIFICATION OF GROUNDS URGED BY THE AMICUS CURIAE CRIMINAL COURTS BAR ASSOCIATION FOR REVERSAL OF THE JUDGMENTS BELOW

I

WHEN THE OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES SECRETLY PLANTED A MAN IN THE CAMPS OF THE DEFENSE TO SPY ON IT DURING THE TEST-FLEET TRIAL, AND FOR ANY OTHER SUBSEQUENT PURPOSE, IT VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. EVIDENCE SO OBTAINED WAS ILLEGAL, CONTINUED TO BE ILLEGAL, AND SHOULD HAVE BEEN SUPPRESSED FOR ANY USE AT ANY TIME OR PLACE.

II

THE USE OF HOFFA'S OWN WORDS, THROUGH THE LIPS OF A GOVERNMENT AGENT PLANTED WITH HOFFA AND HIS ATTORNEYS, TO CONVICT

HIM, VIOLATED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. PLANTING AN AGENT OF THE GOVERNMENT IN THE RANKS OF THE DEFENSE ALSO DENIED DUE PROCESS OF LAW AND FAIR TRIAL PROCEDURE GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III

THE DEFENDANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AMENDMENT, WERE DESTROYED.

I

WHEN THE OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES SECRETLY PLANTED A MAN IN THE CAMPS OF THE DEFENSE TO SPY ON IT DURING THE TEST-FLEET TRIAL, AND FOR ANY OTHER SUBSEQUENT PURPOSE, IT VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. EVIDENCE SO OBTAINED WAS ILLEGAL, CONTINUED TO BE ILLEGAL, AND SHOULD HAVE BEEN SUPPRESSED FOR ANY USE AT ANY TIME, OR PLACE.

SUMMARY OF THE POINT

Evidence introduced on the motion to suppress the evidence of Edwin Grady Partin, secretary of Local 5, Teamster Union, [R. 270] showed that Partin was contacted by Mr. Frank Grimsley, an F.B.I. agent, who told

him to contact Mr. Sheridan (Walter Sheridan, an employee in the office of the Attorney General of the United States) [R. 271]. The evidence showed that Partin was in the Baton Rouge Parish jail, in Louisiana, when he contacted a Mr. Daniels, an investigator for the District Attorney's office in Baton Rouge, with the subsequent result that arrangements were made for him to get released from the jail and to be placed among the ranks of the defendant, with instructions to report secretly to the office of the Attorney General of the United States supposedly particularly regarding any evidence of jury tampering or other illegal activities (R. 271).

Full details of this planting of an agent of the government into the camps of the defense, along with the defendant, and in and around the offices of the defendant and his attorneys, will no doubt be set forth in full in the briefs of the petitioner in case No. 32. It is sufficient for our purpose to set out that the planting of an agent of the government, as Edwin Grady Partin became, violated the Fourth Amendment to the Constitution of the United States and destroyed the confidential relationship of attorney and client guaranteed by the Sixth Amendment to the Constitution of the United States, and the use of the testimony of Partin thereby destroyed the effective assistance of counsel under the Fifth and Sixth Amendments to the Constitution of the United States.

Like a thief, Partin stole the right of privacy and the absolute right of confidential relationship of the defendant and his counsel after he was taken out of jail and deliberately placed with the defense for spying purposes during the so-called Test-Fleet trial. He imparted his stolen information to the office of the Attorney General of the United States, in violation of the defendant and his attorneys' constitutional rights to absolute privacy.

But the government contended that the information thus purportedly gathered by Partin became useful to the government in the subsequent trial and therefore, they could use it there where, admittedly apparently, they could not have used it had they tried to introduce it in a re-trial in the earlier case, if one were had.

But stolen documents or stolen information, whenever taken, require suppression under the Fourth Amendment to the Constitution of the United States.

In *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 64 L.ed. 319, 321, it appeared that government agents stole documents, photographed them and then returned them. Later, they attempted to use the information thus gained in a trial. Justice Holmes rejected this effort.

This Court has also held that the integrity of individual rights demands that evidence secured in violation of the Fourth Amendment is inadmissible in any federal trial and must be suppressed.

Mapp v. Ohio, 367 U.S. 643, 6 L.ed.2d 1081

Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 64 L.ed. 319.

ARGUMENT

The defendant's rights under the Fourth Amendment were violated by the planting of Edwin Grady Partin with the defendant and in the camps of his attorneys and the use of evidence obtained while he was a secret agent of the government. The motion to suppress this evidence should have been granted and the evidence excluded, upon trial, as violative of the Fourth Amendment to the Constitution of the United States as well as of the Fifth and Sixth Amendments to the Constitution of the United States.

In two leading cases on the invasion of the right of privacy of a client and his attorney and the right to have the evidence thus quashed, the court dealt with that right under the Fifth and Sixth Amendments to the Constitution of the United States.

Coplon v. United States, 191 F.2d 749;

Caldwell v. United States, 205 F.2d 879.

We respectfully contend that the acts of the government invaded the defendant's constitutional rights under the Fourth Amendment also and requires that the evidence be suppressed under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

In *Coplon v. United States,* 191 F.2d 749, a government employee was charged, in the District of Columbia, with having taken, copied, made and obtained documents, writings and notes which were official files and records of the Department of Justice containing intelligence reports relating to espionage and counter-espionage activities (191 F.2d 749). The second count of the indictment charged removal of those documents, to the injury of the United States. The defendant charged that agents of the Federal Bureau of Investigation intercepted telephone conversations between her and her counsel, both before and during her trial in the District of Columbia.

The court said there:

"If this occurred, it was a violation of the appellant's constitutional rights. The Fifth Amendment enjoins that no person be deprived of life, liberty or property without due process of law. Such due process includes the right of one accused of crime to have the effective and substantial aid of counsel. Neufield v. United States, 1941, 73 App.D.C. 174,

182, 118 F.2d 375, 383. Moreover, the Sixth Amendment provides that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.'

"It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.

"In Louie Yung v. Coleman, D.C.S.D., Idaho 1934, 5 F.Supp. 702, certain Chinese defendants in a state court, held in jail, were unable to speak English and their counsel could consult with them only through an interpreter. He asked permission to do that, but the sheriff and the prosecuting attorney refused to allow the consultation unless there was also present an interpreter selected by them. The defendants petitioned a federal district court for writs of habeas corpus. The court denied the writs but directed the defendant-sheriff to allow the petitioners to consult privately with their counsel through an interpreter selected by them. The court noted that the Sixth Amendment and the due process clause of the Fourteenth Amendment give the accused in criminal prosecutions the right to the assistance of counsel at all times."

The Court further said:

"The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts. The court said in Ex parte Rider, 1920, 50 Cal.App. 797, 195 P. 965: 'The right of an accused, confined in jail or other place of detention pending a trial of the charge against him, to have an opportunity to consult freely with his counsel with-

out any third person, whose presence is objectionable to the accused, being present to hear what passes between the accused and his counsel, is one of the fundamental rights guaranteed by the American criminal law — a right that no Legislature or court can ignore or violate.'

"The same court held in Ex parte Snyder, 1923, 62 Cal.App. 697, 217 P. 777, that failure to allow a defendant confined in jail to have private consultation with his counsel violates his constitutional rights, and again in 1943 the California court, in Ex parte Qualls, 1943, 58 Cal.App.2d 330, 331, 136 P.2d 341, 342, said, 'Their right to private consultations with their counsel is a corollary of the constitional right to be represented by counsel in their defense.'

"In an Illinois case where the judge allowed the public defender only five minutes to talk with the defendant, did not permit conversation between them in a private room, and insisted on immediate trial, it was held that a fair trial had been denied. People v. Shiffman, 1932, 350 Ill. 243, 182 N.E. 760.

"In New York it has been said that: '* * * It is also equally true that the right to a private interview by a person accused of crime with his lawyer prior to trial is a valuable right, and it is the duty of the court to jealously guard the accused from deprivation thereof.' Hughes v. Cashin, 1945, 184 Misc. 757, 54 N.Y.S.2d 437, 440-441.

"Other state cases to the same effect are State v. Collett, Ohio App. 1944, 58 N.E.2d 417; McBride v. State, 1932, 121 Tex.Cr.R. 549, 51 S.W.2d 337; Snook v. State, 1929, 34 Ohio App. 60, 170 N.E. 444;

Ford v. State, 1929, 121 Ohio St. 292, 168 N.E. 139; Thomas v. Mills, 1927, 117 Ohio St. 114, 157 N.E. 488, 54 A.L.R. 1220; Sanderson v. State, 1926, 105 Tex.Cr. 198, 287 S.W. 251; Turner v. State, 1922, 91 Tex.Cr. 627, 241 S.W. 162, 23 A.L.R. 1378; State ex rel. Tucker v. Davis, 1913, 9 Okl.Cr. 94, 130 P. 962, 44 L.R.A., N.S. 1083.

"These cases unequivocally establish the principle that the two Amendments guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner. The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel. (emphasis ours.) We consider it equally true that a defendant and his lawyer have a right to talk together by telephone without their conversations being monitored by the prosecution through a secret mechanical device which they do not know is being used. It would not be an answer to say that the accused cannot complain of the interception of his telephone conversations with his counsel if he had on other occasions ample personal consultation with his lawyer, face to face, which no person overheard. That fact would not erase the blot of unconstitutionality from the act of intercepting other consultations." (191 F.2d at 758-759)

We add to the contention that such acts do more than violate the relationship and client, it also violates the Fourth Amendment, as we shall hereinafter argue.

In *Caldwell v. United States,* 205 F.2d 879, the government employed one Bradley to find out about the activi-

ties of Caldwell in connection with an attempt to reach jurors in a criminal trial of another person. He acted in a dual capacity as defense assistant and government agent. As the Court pointed out in the facts in the *Caldwell* case: "Bradley so conducted himself that he gained free access to the planning of the defense." This was like Partin, who gained free access to all the activities of the defense in the Hoffa matter.

The prosecution in the *Caldwell* case knew what was going on, got full reports on it, and while Bradley continued to aid the defense he was also reporting to the prosecution. The Court in the *Caldwell* case, on the basic facts, quoting from the *Coplon* case, *supra,* said: "We there held flatly that 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.'" The Court also said:

> "The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand." (205 F.2d 879, 881)

Stolen goods or illegally gotten evidence, whenever and wherever obtained, are still stolen and illegally gotten and should be suppressed whenever and wherever their use is attempted.

It is thus no valid argument to say that this illegally and unconstitutionally secured evidence was not used

until a later time. This same argument was advanced and rejected by Mr. Justice Holmes in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.ed. 319.

In *Wolf v. Colorado*, 338 U.S. 25, 93 L.ed. 1782, Mr. Justice Frankfurter, speaking for the Court, said:

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It it therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of the English-speaking peoples. (93 L.ed. p. 1785-1786)
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into the privacy it would run counter to the guaranty of the Fourteenth Amendment."

This Court need have no hesitation in saying that where the Attorney General of the United States through his administrative assistant not merely sanctioned but actively connived such intrusion by one of his agents to the privacy of the defense, that it runs counter to the guarantee of the Fourth and Fourteenth Amendments to the Constitution of the United States. The passing of time or the purpose of its use cannot erase its illegality or sanction its use.

In the later case of *Irvine v. California*, 347 U.S. 128, 98 L.ed. 561, the doctrine of the *Wolf v. Colorado* case

was again reiterated, this time with a statement of the facts that were not evident in the *Wolf* case. The *Wolf* case involved purported abortions by a doctor. The police went into the offices of the doctor, seized his books and records and then, on the information thus obtained, as to the names of the patients, went out and saw them and thereafter secured them as witnesses in a prosecution against the doctor.

This Court, however, in *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081, in a majority opinion written by Mr. Justice Clark, overruled its earlier holding that it was not necessary to exclude the evidence thus illegally obtained.

For, as stated by Mr. Justice Clark in *Mapp v. Ohio, supra,* the experience of California that other remedies have been worthless and futile in enforcing rights guaranteed by the Constitution of the United States, required the exclusion of evidence obtained in violation of the Fourth Amendment to the Constitution of the United States. Nor will the courts look at nicety of prejudice. *Glasser v. United States,* 315 U.S. 60, 86 L.ed. 630.

The evidence used to sustain the conviction in this case and offered as the principal, if not the sole, evidence was that of the government agent Edwin G. Partin, a narcotic user and a man who had been taken out of jail for the purpose of being planted among the defendants as the secret representative of the government.

The participation of the office of the then-Attorney General of the United States in the invasion of the defendant's rights under the Fourth Amendment are not only told but boasted of in articles entitled *"The Inside Story of the Attorney General's Task Force That Convicted Teamster Boss"*. [R. 115-116]

The activities of the government in planting Partin among defense counsel and the defendant are virtually admitted, although camouflaged in language. The undenied story, perhaps the boastful story, is told in the Life Magazine article contained on page 115 of the record, *"The Inside Story of the Attorney General's Task Force That Convicted Teamster Boss", "Hoffa, How They Nailed Him"*. The story is there told how Walter Sheridan, who is not an attorney, got a job with the then-Attorney General and has, since 1957, been working in connection with the matter and how a "special unit presently numbering *fifteen lawyers and investigators,* mostly in their thirties," was set up to try to "get" Hoffa and how Edwin G. Partin became a government agent secretly planted among the defense and communicated daily with Sheridan.

Edwin Grady Partin admitted that he had directions to call Sheridan (assistant in the Attorney General's office). [R. 271] His activities, which are set forth in detail in the second volume of the transcript, No. 32, October Term, 1966, are not denied. In that respect, it has many of the earmarks of the case of *Irvine v. California,* 347 U.S. 128, 98 L.ed. 561. In the *Irvine* case, the state officers, in order to get evidence of bookmaking activities for a future prosecution, secretly entered the home of Irvine when Irvine and his wife were absent, arranged to have a locksmith go there and make a door key, then, in the absence of Irvine, made entry into the home and installed a concealed microphone in the hall. (347 U.S. 130-132) When the microphone did not pick up the sounds they wanted, they entered the house again and placed it in another part of the house and posted themselves in a garage about a half a block away to listen. They placed the microphone in a closet near the bedroom

of Irvine so that they could gather information for a future prosecution.

This Court, in that case, recommended that the officers be prosecuted for violating the civil rights secured to the defendant and for deprivation of any rights, privileges or immunities secured by the Constitution of the United States. (347 U.S. 137-138) But the officers were never prosecuted, and the recommendation became meaningless.

In the instant case, the officers did not plant an electronic microphone. They, under the direction of the Attorney General's office, in effect planted a human microphone, to-wit: Partin. What does one do when the government plants the human microphone in a government case? Certainly, the government cannot be made to prosecute the government for violation by the government of the defendant's constitutional and statutory rights. Hence, there is only one remedy, and that is laid out by Mr. Justice Clark in *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081. In the *Irvine* case, Mr. Justice Clark said that had he been on the Court in 1949 when *Wolf v. Colorado* was decided, he would have applied the doctrine of *Weeks v. United States,* 232 U.S. 383, 58 L.ed. 652. (347 U.S. 138) However, in *Mapp v. Ohio* he did apply the doctrine of *Weeks* since he found that the methods suggested in *Wolf* and *Irvine* were ineffectual. (367 U.S. 652)

In *Irvine v. California,* 347 U.S. 128, 98 L.ed. 561, Mr. Justice Douglas said:

> "I protest against this use of *unconstitutional evidence* . . . The Bill of Rights was designed to protect every accused against practices of the police which history showed were oppressive of liberty. The guar-

antee against unreasonable searches and seizures contained in the Fourth Amendment was one of those safeguards. In 1914 a unanimous Court decided that officers who obtained evidence in violation of that guarantee could not use it in prosecutions in the federal courts. Weeks v. United States, 232 U.S. 383, 58 L.ed. 652. Lawless action of the federal police, it is said, 'should find no sanction in the judgment of the courts . . .' (232 U.S. p. 392)"

Lawless action of Mr. Sheridan, of the office of the United States Attorney General, and Mr. Partin, late of the Baton Rouge jail, should find no sanction in the judgment of the Court.

Evidence thus obtained is "fruit of the poisoned tree." *Nardone v. U.S.*, 308 U.S. 338, 84 L.ed. 307.

In *Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081, the Court held that practices such as occurred here would violate the Fourteenth Amendment. Likewise, we submit that they violate the Fourth Amendment.

"Seventy-five years ago, in Boyd v United States, 116 US 616, 630, 29 L ed 746, 751, 6 S Ct 524 (1886), considering the Fourth[4] and Fifth Amendments as

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[4] "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

running 'almost into each other'[5] on the facts before it, this Court held that the doctrines of those Amendments 'apply to all invasions on the part of the government and its employes of the sanctity of a man's home *and the privacies of life.*' (Ital. ours) It is not the breaking of his doors, and the rummaging of his drawers, 'that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments].'

"The Court noted that 'constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' At p. 635.

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[5] The close connection between the concepts later embodied in these two Amendments had been noted at least as early as 1765 by Lord Camden, on whose opinion in Entick v Carrington, 19 Howell's State Trials, 1029, the Boyd court drew heavily. Lord Camden had noted, at 1073:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; *and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.*" (Italics ours)

"In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that 'independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' I Annals of Cong 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as 'unconstitutional.' At p. 638.

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"This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.' Holmes, J., Silverthorne Lumber Co. v. United States, 251 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426 (1920). It meant, quite simply, that 'conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ,' Weeks v United States, supra (232 US at 392), and that such evidence 'shall not be used at all.' Silverthorne Lumber Co. v United States, supra (251 US, at 392)."

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"Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable

federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'" (6 L ed 2d 1085, et seq.)

The welfare of all attorneys practicing law, and their clients, is involved in this important phase of the case. If police or prosecutors can plant informers in their midst, then the sacred right of privacy, which has so long been protected by the Fourth Amendment and Sixth Amendment, is destroyed. Certainly, this Court maintains the utmost secrecy of its decisions and opinions and would hold any plant of any secretary or person in the confines of the Justices of this Court or of the printers of opinions as a violation of those fundamental rights of privacy guaranteed by the Fourth Amendment. We respectfully submit that an attorney is entitled to the same protection.

The holding of the courts below in other cases bears this out.

Coplon v. United States, 191 F.2d 749, *Certiorari denied.*

Working arrangements between the non-lawyer representative of the Attorney General and Partin thus resulted in intrusion into the privacy of the defendant and his attorneys and runs counter to the guarantees of the Fourth Amendment to the Constitution of the United States.

Mr. Hoffa is one of those entitled to be secure in his person against unreasonable searches and seizures and it was and is therefore necessary, under the authority of *Mapp v. Ohio,* and other cases cited herein, to suppress the evidence, as properly moved for in this case.

The Court in *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081, further quoted from *Olmstead v. United States,* 277 U.S. 438, 72 L.ed. 944, and in unmistakable language restated the *Weeks'* rule:

> "'The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment.' At p. 462."

Mr. Justice Douglas, in his opinion in *Irvine v. California,* 347 U.S. at 150, said:

> "What transpired here was as revolting as the abuses arising out of the writs of assistance against which James Otis complained."

We think the same may be said in the Hoffa case.

Mr. Justice Rutledge, speaking in *Wolf v. Colorado,* at 338 U.S. 47, 48, said:

> "Twenty-nine years ago this Court, speaking through Justice Holmes, refused to permit the Government to subpoena documentary evidence which it had stolen, copied and then returned, for the reason that such a procedure 'reduces the Fourth Amendment to a form of words'. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 64 L.ed. 319"

Again, he said:

> "The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established. See Olmstead v. United States, 277 U.S. 438, 462, 72 L.ed. 944, 949, 66 A.L.R. 376. It is too late in my judgment to question it now. We apply it today in Lustig v. United States, 338 U.S. 74, post, 1819 . . . Compliance with the Bill of Rights betokens more than lip service." (93 L.ed. 1796)

Thus, it appears that the Fourth Amendment forbids evidence obtained illegally through Partin and the use attempted to be made of it at the trial which is before the Court now.

As stated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 64 L.ed. 319, 321:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

II

THE USE OF HOFFA'S OWN WORDS, THROUGH THE LIPS OF A GOVERNMENT AGENT PLANTED WITH HOFFA AND HIS ATTORNEYS, TO CONVICT HIM, VIOLATED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. PLANTING AN AGENT OF THE GOVERNMENT IN THE RANKS OF THE DEFENSE ALSO DENIED DUE PROCESS OF LAW AND FAIR TRIAL PRO-

CEDURE GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

SUMMARY OF THE POINT

The Fifth Amendment forbids the use of evidence illegally obtained to convict one by his own words. In this respect, the Fourth Amendment must be read together with the Fifth Amendment.

The Court of Appeals sustained the conviction of petitioner Hoffa on the basis of testimony by Partin, the government agent, who purportedly quoted Hoffa's own words and used them to convict him. This is forbidden under the Fourth and Fifth Amendments and under the authority of *Massiah v. United States,* 377 U.S. 201, 12 L.ed. 2d 246, *Griffin v. California,* 380 U.S. 609, 14 L.ed.2d 106, *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 12 L.ed.2d 678, and *Malloy v. Hogan,* 378 U.S. 1, 12 L.ed.2d 653. These cases forbid the use of testimony obtained from the defendant in violation of his constitutional rights under the Fourth and Fifth Amendments.

ARGUMENT

The use of Hoffa's alleged words to Partin, presented by the government to the jury to obtain Hoffa's conviction in this case, violates the Fifth Amendment to the Constitution of the United States and violates the rule of *Griffin v. California,* 380 U.S. 609, 14 L.ed.2d 106, *Massiah v. United States,* 377 U.S. 201, 12 L.ed.2d 246, *Malloy v. Hogan,* 378 U.S. 1, 12 L.ed.2d 653, and *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 12 L.ed.2d 678.

In *Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081, Mr. Justice Black said:

> "The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem, has long been recognized and, indeed, was expressly made the ground for this Court's holding in Boyd v. United States (116 U.S. 616, 29 L.ed. 746). There the Court fully discussed this relationship and declared itself 'unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.' It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the Wolf case. And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by more recent cases . . ."

Quoting from Mr. Justice Bradley in the *Boyd* case, Mr. Justice Black said:

> "'Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the Court to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"

Admittedly, Partin was an agent of Walter Sheridan of the United States Attorney General's office in this matter. Admittedly, he was seeking to obtain statements which could be used against Hoffa and from Hoffa's own

lips. Admittedly, as the Circuit Court's opinion shows, the conviction has been sustained on the basis of those purported statements of Hoffa's to Partin, the government agent, obtained through fraud and trickery and in violation of the Fifth Amendment to the Constitution of the United States. Obviously, Hoffa was not at any time apprised of Partin's part in the schematic effort to obtain incriminating statements from him. Those statements, whether true or false, were admitted into evidence, with the backing of the government. In effect, the party producing a witness in a criminal case vouches for his belief in the witness's credibility. On this basis, Partin's testimony was allowed to be used against Hoffa and motions to suppress it as having been illegally and unconstitutionally obtained, were denied. Such statements violated the constitutional privilege of Hoffa against self-incrimination.

Griffin v. California, 380 U.S. 609, 14 L.ed.2d 106;

Malloy v. Hogan, 378 U.S. 1, 12 L.ed.2d 653;

Murphy v. Waterfront Commission of New York, 378 U.S. 52, 12 L.ed.2d 678;

Massiah v. United States, 377 U.S. 201, 12 L.ed.2d 246.

The court said in *Caldwell v. United States,* 205 F.2d 879, 881:

> "On these basic facts, so stated, we think our decision in the Coplon v. U. S. case is controlling. We there held flatly that 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' More specifically, we held that interception of supposedly private telephone consultations between accused and counsel,

before and during trial, denies the accused his constitutional right to effective assistance of counsel, under the Fifth and Sixth Amendments. And the denial "invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial. We see no reason why intrusion by means of wiretapping should be differentiated from intrusion by means of secret agents. In neither instance, we think, need actual prejudice be shown in order to entitle defendant to a new trial.

"We do not mean to deny the right—indeed the duty—of prosecuting officials to seek to uncover, prosecute and punish resort by accused persons and their counsel to theft of files or other unlawful means of defense. We recognize that the prosecutor in this case was faced with a real dilemma, once the possibility of a theft of the files had been reported by Bradley. We do not question that he then acted with what must have seemed high motives, and certainly with active diligence. But high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel. The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot

stand. Appellant's motion for a new trial should have been granted."

In *Massiah v. United States,* 377 U.S. 201, 12 L.ed.2d 246, the Court held that the defendant was denied the basic protection of the Constitution of the United States when evidence of his incriminating statements was used against him at the trial, which statements had been surreptitiously but deliberately elicited from him by federal agents in the absence of his counsel.

As the Court pointed out in *Massiah,* quoting with approval Judge Hayes (from the Court of Appeals), the rule against using testimony deliberately elicited by federal agents "must apply to indirect and surreptitious interrogation as well as those conducted in the jailhouse. **In this case Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent. 307 F.2d 72, 73."** (377 U.S. 206, 12 L.ed.2d at 250)

In the instant case, the secret planting of government agents, in the form of Partin and Robert D. Vick [R. 154], to participate in discussions in the lawyers' offices and then to use the words which it is claimed the defendant said to convict him, was a more serious imposition than even in the *Massiah* or *Spano* cases. (*Spano v. New York,* 360 U.S. 315, 3 L.ed.2d 1265.)

In the case of *Boyd v. United States,* 116 U.S. 616, 29 L.ed. 746, this Court held that compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution of the United States in all cases in which a search and seizure would be, because it is a material ingredient and affects the sole object and purpose of the search and seizure.

The Court stated the principle that the Fourth and Fifth Amendments throw great light on each other. The Court said:

> "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself' throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

We respectfully submit that having an agent of the government present to take the oral words of a defendant, to be used in a criminal case against him, is equivalent to the seizure of private papers in which they seek to use his own words in documents against him. To paraphrase *Boyd v. United States, supra,* we cannot see that use in evidence thus obtained by a specifically planted government agent is substantially different from compelling him to be a witness against himself.

A similar holding was made in *Blum v. State,* 94 Md. 375, 51 Atl. 26,56 L.R.A. 322.

The spirit of the constitutional prohibition against unreasonable searches and seizures, has its course in that principle of the common law which finds expression in the maxim that "every man's house is his castle." English history discloses as the original occasion for constitutional provisions on the subject that they had their origin

"in the abuse of executive authority, and in the unwarrantable intrusion of *executive agents* into the houses and among the private papers of individuals, in order to obtain evidence of political offenses." (Cooley's Constitutional Limitations, 300.) The struggle in England against the right of seizing private manuscripts and papers, on warrants of search, began substantially with the resistance of Wilkes to the warrants of Lord Halifax, which culminated in the action of Wilkes against Wood, the under secretary of state. In that action, Lord Chief Justice Pratt said: "The defendant claimed a right under precedents, to force persons' houses, break open escritoires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."

The case of *Entick v. Carrington,* 19 Howell's State Trials, 1030, *** marks another step in the struggle, made in England against the right to seize private papers. That was the case of a warrant to search for and seize the papers of the accused, in the case of a seditious libel, Lord Camden delivering the judgment of the court. He says of the great point involved in that cause, that if it "should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the

author, printer, or publisher of a seditious libel." (Cooley on Constitutional Limitations, 300.)

Chatham in his speeches on general warrants declared the scope and application of the principle, when he said, "The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; *but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.*" (Emphasis ours)

We respectfully assert that the Attorney General, through his agents, may not enter either without violating the Constitution of the United States. All his forces, all his special agents, all his special employees, his Walter Sheridans, Edwin Partins and Robert Vicks may not legally enter. To do so they violate the Fourth Amendment to the Constitution of the United States, and what they claim to have heard or learned must be suppressed.

The Constitution of the United States, as originally adopted and ratified by the States, contained no provision expressing the principle of personal protection against searches and seizures. Mr. Madison, at the first session of the first Congress, however, proposed such further proceedings regarding freedoms beyond the reach of the government. (Rives' *Life and Times of Madison*, 39-40) The debates in Congress show that the purpose of the amendments in the view of Mr. Madison, was to render the Constitution acceptable to the whole people of the United States. The debates upon the Fifth Amendment followed and ultimately ended in the adoption of the Fourth and Fifth Amendments, reaffirming established principles of common law into the Constitution of the United States.

United States v. 3 Tons of Coal, Fed.Cas. No. 16515, 6 Biss. (U.S.) 379.

Such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property and the very essence of constitutional liberty.

Gouled v. United States, 255 U.S. 298, 65 L.ed. 647.

If it is possible to place an agent of the Attorney General secretly and deliberately among the defendants and their counsel, then the rights guaranteed under the Fourth and Fifth Amendments have been effectually and completely destroyed. It matters not when the information was gathered, if it was gathered surreptitiously and secretly and through trickery and device as it was here.

The Fourth Amendment's rights have been considered so important in recent years as to be enforceable against the States under the Fourteenth Amendment.

Mapp v. Ohio, 367 U.S. 643, 6 L.ed.2d 1081.

Numerous studies of police practices in the United States reveal extensive lawlessness in the invocation and application of the criminal law, among these being the over-zealous and improper use of so-called undercover agents, calling for this Court's supervisory action of criminal justice.

III

THE DEFENDANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AMENDMENT, WERE DESTROYED.

SUMMARY OF THE POINT

The Sixth Amendment provides: "In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense." Implicit in this amendment are all the rights of counsel, the right to preparation of the case in secret and with all freedom and secrecy in the full discussion of his case and without the government or the State having the right to plant an informer, agent or spy in the camp of the attorney or the defendant.

The use of such tactics destroys the *effective* assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States.

ARGUMENT

The government, by placing Partin with the defendant and in the camps of the defense counsel, destroyed the *effective* assistance of counsel for the defense of Hoffa as guaranteed by the Sixth Amendment to the Constitution of the United States. This right of secrecy in the camp of the defendant and his counsel is a right of fair play (Fifth Amendment) and is guaranteed by and inherent in the right of counsel guaranteed by the Sixth Amendment to the Constitution of the United States.

Gideon v. Wainwright, 372 U.S. 335, 9 L.ed.2d 799;

Powell v. Alabama, 287 U.S. 45; 77 L.ed. 158.

Effective assistance of counsel means the right to confer freely, openly and privately with one's counsel, without having a spy in its ranks. If this Court were to hold otherwise, a complete freedom of an attorney with his client would be constantly jeopardized by the danger of invasion by spying tactics such as have been condemned in the *Coplon* and *Caldwell* cases. We submit that the effective assistance of counsel, guaranteed by the Sixth Amendment, requires that assistance be free and untrammeled and requires that this Court reverse the judgments below in the preservation of the rights of all attorneys throughout the land.

Implicit in the right to counsel is the right to have counsel unrestricted in his right to confer and to keep all matters in secret.

Coplon v. United States, 191 F.2d 749;

Caldwell v. United States, 205 F.2d 879.

Indeed, secrecy is enjoined upon counsel himself. One of the oaths which a counsel must take is to keep all matters secret.

"Attorneys" *Business & Professions Code of the State of California;*

Glasser v. United States, 315 U.S. 60, 86 L.ed. 630;

People v. Lanigan, 22 Cal.2d 569, 576, 579.

But counsel has many duties to perform in handling a criminal case. In *People v. Ibarra,* 60 Cal.2d 460, the Supreme Court of California set forth some of the duties and obligations of an attorney when defending in a criminal case, without which he would be guilty of negli-

gence.* These duties require the utmost confidential relationship in the preparation of a trial. The invasion of that privacy by the opposing camp by the planting of either microphones or by the planting of a personal spy, destroys the effective assistance of counsel, in violation of the Sixth Amendment to the Constitution of the United States.

People v. Ibarra, 60 Cal.2d 460;

People v. Lanigan, 22 Cal.2d 569, 576, 579;

Caldwell v. United States, 205 F.2d 879;

Coplon v. United States, 191 F.2d 749.

Such preparation for trial and defense requires absolute secrecy to enable freedom of expression and conferences.

The testimony of Partin, having been illegally obtained, was fruit of the poisoned tree which the government used in the subsequent trial under circumstances that affect fair play and that fundamental system of justice which inheres in our institutions. The use of such evidence has repeatedly been condemned by this Court.

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* "Defendant contends that the failure of his counsel to object demonstrates a lack of knowledge of the law that establishes a denial of his constitutional right to 'effective aid in the preparation and trial of the case.' (*Powell* v. *State of Alabama,* 287 U.S. 45, 71 [53 S.Ct. 55, 77 L.Ed. 157, 171-172, 84 A.L.R. 527, 541].)... It is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled. (*People* v. *Mattson,* 51 Cal.2d 777, 790-791 [336 P.2d 937]; *People* v. *Avilez,* 86 Cal.App.2d 289, 296 [194 P.2d 829]; see also *Mitchell* v. *United States,* 259 F.2d 787, 793.)"

See: *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 64 L.ed. 319, where the government stole documents and photocopied them and later tried to use the benefits of these documents in a subsequent trial.

Nardone v. United States, 308 U.S. 338;

Wong Son v. United States, 371 U.S. 471.

The foregoing cases condemn and reverse the use of wrongfully obtained and forbidden evidence.

Mr. Justice Brandeis said, dissenting in *Olmstead v. United States,* 277 U.S. 438, 485, 72 L.ed. 944, quoted with approval by Mr. Justice Clark in *Mapp v. Ohio,* 367 U.S. 643, 659, 6 L.ed.2d 1081, 1092:

> "'Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'."

This Court must sustain the right of attorneys everywhere to know that in the preparation and trial of any case they will not be hampered by the invasion of a government agent and his constant presence, unknown to the defendant or his counsel, in that case, or a future case of the same defendant.

In *Massiah v. United States,* 377 U.S. 201, 12 L.ed.2d 246, this Court held that evidence seized in an illegal search is excluded in criminal prosecutions to secure meaningful enforcement of the Fourth Amendment. The petitioner in that case was, in 1958, a member of the crew of the SS Santa Maria. After his indictment on a charge of violating the federal narcotics laws, the government used a co-defendant to install a Schmitt radio trans-

mitter under the front seat of Colson's automobile by which government agents could overhear conversations between the defendant Massiah and Colson. The Court held that permitting the agent Murphy to testify at the trial to the petitioner's incriminating statements which Murphy had overheard, under the circumstances was an error of constitutional proportions which violated the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, because the government had deliberately elicited incriminating statements from Massiah.

Likewise, in the case at bar, the government was permitted to plant Partin with the defendant, as well as his counsel, and was permitted to use in evidence against the defendant allegedly incriminating statements which Partin, the government agent, and Walter Sheridan had deliberately elicited from the defendant in the absence of his retained counsel.

The Court in *Massiah* said:

> "It is said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' (360 U.S. at 326)." (12 L.ed.2d 249)

We submit that the purity of the courts and the purity of justice demand reversal of proceedings and tactics used in this case. They were unfair, unjust and un-American. They violated those fundamental principles of justice which inhere in fair play under the Fourteenth Amendment to the Constitution of the United States.

Powell v. Alabama, 287 U.S. 45, 77 L.ed. 158.

To use the language of *Massiah v. United States:*

> "But, as Judge Hayes pointed out in his dissent in the Court of Appeals, 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case Massiah was more seriously imposed upon * * * because he did not even know that he was under interrogation by a government agent.' (307 F.2d 72, 73)" (12 L.ed.2d 250)

Likewise, Hoffa did not know that he was under interrogation by a government agent, to-wit: Partin.

We respectfully submit that respect for law and justice and the dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime require reversal of the judgments here, in which the effective assistance of counsel under the Sixth Amendment was destroyed.

We respectfully pray that this Court, under its supervisory power of criminal law and justice, hold that the deceptive placing of a secret informer in the quarters and councils of a defendant during one criminal trial, or at any time, violates defendant's Fourth, Fifth and Sixth Amendment rights and that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge and for all other purposes.

Respectfully submitted,

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